IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO. 403 OF 1988

1. Ganba Dhondiba Nanaware.
2. Chandrakant Mahadev Nanaware. .... Appellants.
(Org.Plaintiffs.)

Versus.

1. Anna Dhondiba Nanaware,
deceased through his heirs:
A) Dhairyashil Anandrao Nanaware.
B) Ashok Anandrao Nanaware.
C) Hari Anandrao Nanaware.
D) Vithal Anandrao Nanaware.
E) Sanjay Anandrao Nanaware.
F) Baby Hanmant Pawar.
G) Krishnabai Hindurao Jamadade.
H) Kalawati Anandrao Nanaware,
Nos.1(C) to 1(E) minors by
their Guardian ad litem mother
Kalawati 1(H).

2. Laxman Maruti Nanaware,
deceased through his heirs.
A) Ramchandra Laxman Nanaware.
B) Narayan Laxman Nanaware.
C) Bayadabai Anandrao Bhosale.

3. Dhondabai w/o.Wamanrao Pawar.
4. Tanubai w/o.Bhikoba Kapare.
5. Banubai w/o.Tukaram Danavale.
6. Eknath Shivram Mane. .... Respondent.
(Org.Defendants.)

Shri R.M.Nakhawa for the Appellants.

Shri P.J.Shinde for the Respondents Nos.1(A) to 1(D),
1(F) to 1(G) and 6.

CORAM : ABHAY S. OKA, J.

DATED : 19th & 23rd August, 2004.

ORAL JUDGMENT.

1. On 9th August 1988, this Second Appeal was admitted by this Court. The substantial questions of law were not framed specifically at the time of admission. As held by the Apex Court in many recent Judgments, the High Court gets jurisdiction to hear a Second Appeal finally only if a substantial question of law arises in the Second Appeal and a Second Appeal is to be heard only on substantial questions of law formulated by the High Court. As the Second Appeal was admitted sixteen years back, it will not be appropriate to relegate the parties to the stage of admission. When this Court admitted the Second Appeal, it was admitted obviously because substantial question of law was involved. In such a case the High Court is not powerless. Proviso to sub-section (5) of section 100 of the Code of Civil Procedure,1908 gives power to this Court to hear the Appeal on a substantial question of law not formulated earlier. After hearing the Counsel appearing for the parties for sometime and after perusing the Memorandum of Appeal, I am satisfied that substantial questions of law are involved in the appeal which I have framed in exercise of the powers under the proviso to sub-section (5) of section 100 of the said Code. The Counsel appearing for both the parties were made aware about the

said substantial questions of law involved which are as under:

(i) Whether the Courts below failed to properly interprete the document at Exhibits 56 and 94 which showed that the suit land was not the exclusive property of the Respondent No.1 ?

(ii) Whether the finding of the Appellate Court that the suit property was self acquired property of the Respondent No.1 is perverse being contrary to the documentary evidence on record ?

(iii) Whether the suit was not maintainable on account of non-joinder of necessary parties ?

2. With a view to appreciate the submissions made by the Counsel appearing for the parties, it will be necessary to refer to the facts of the case in brief. The Appeal is preferred by the Plaintiffs and the Respondents are the Defendants. The case of the Appellants is that the Appellant No.1, the father of Appellant No.2 and the Respondent No.1 have together 8 anna share in the suit property, the Respondent No.2 has four anna share in the suit property and the Respondent

Nos.3 to 5 have four anna share therein. The case made out by the Appellants is that the suit land originally belonged to Dhondiba (the grand father of the Appellant No.2 and the father of Appellant No.1 and Respondent No.1) the Respondent No.2 and Ravba (the father of Respondents Nos.3 to 5). The suit land was mortgaged to one Gujar. The case made out by the Appellants is that the Respondent No.1 was acting as Karta of the Joint Family after the demise of Dhondiba. The suit land was redeemed by all the co-owners. However, the document of redemption was executed in the name of the Respondent No.1. The further case made out by the Appellants is that the document was made in the name of the Respondent No.1 as he was the eldest in the family. Thereafter all the brothers were cultivating the suit land. Reference is made to the transaction of the year 1967 when allegedly the Respondent No.1 mortgaged 1 Acre of land out of the suit land to Sitaram Bhaguji Kapse and was subsequently redeemed by the co-owners. Reference is made to the writing dated 10th April 1969 signed by the Respondent No.1 in which he admitted the share of the Appellant No.1 and the father of the Appellant No.2 in the suit land. Thereafter the Respondent No.1 obtained loan from the Land Development Bank and mortgaged the suit land in favour of the Bank. The names of the Appellants were recorded in the record of rights in the

year 1974. However, the mutation entry made was subsequently challenged and the mutation entry was cancelled. The Appellants pleaded that the Respondent No.1 was obstructing their possession and cultivation and therefore, prayed for perpetual injunction. In the alternative, the Appellants prayed for partition and separate possession of their share.

3. The suit was contested by the Respondent No.1 by filing a detailed Written Statement. He contended that during the lifetime of his father he was residing separately and purchased 8 anna share by virtue of two sale deeds from his own funds on 4th February 1936 and 3rd February 1946. His case is that the Appellants have no share in the suit property and the Respondent No.2 has four anna share in the property, and the Respondents Nos.3 to 5 together have four anna share in the property. He denied execution of the agreement dated 10th April 1989. He submitted that even the Bank granted loan in his name and the same was repaid by him. He pointed out that the mutation entry by which the names of the Appellants were recorded was cancelled by the Collector, Satara. A contention was raised that the suit was not maintainable on account of non-joinder of necessary parties.

4. The Respondent No.2 also came out with his written statement and opposed the claim of the Appellants. A contention was raised that the Appellants have no concern whatsoever with the suit property. He denied that the property was previously owned by the father of the Appellant No.1. A contention raised was that the father had no self acquired or ancestral land. The Respondent No.6 also filed his written statement and supported the Respondents Nos.1 and 2. The case of the Respondent No.6 is that he purchased one acre of the suit land from the Respondent No.1 and the said transaction of sale was legal and valid.

5. The learned trial Judge framed various issues including the issue regarding the effect of non-joinder of necessary parties, bar of limitation and the alleged entitlement of the Appellants to 2/3rd share in the suit properties. The learned trial Judge held that the suit was bad for non-joinder of necessary parties. The learned trial Judge came to the conclusion that Ramchandra Mahadeo Nanaware and Ashok Mahadeo Nanaware were necessary parties to the suit. The learned trial Judge negatived the contention of the Appellant regarding their title in respect of the suit land. The learned Judge therefore dismissed the suit. An appeal was preferred by the Appellant to the District Court.

The said appeal has been dismissed by the learned District Judge, Satara. The Appellants have taken exception to the Judgments and Decrees passed by the Courts below by preferring this Second Appeal.

6. In so far as the relationship between the parties is concerned, there is hardly any dispute. It appears that there were four sons of Dhondiba, viz. Genba (Appellant No.1), Anna (Respondent No.1), Bhiku and Mahadeo The Appellant No.2/Plaintiff No.2 is the son of Mahadev. Mahadev had two more sons apart from Appellant No.2 Chandrakant. The names of the said two sons are Ramchandra and Ashok. Dhondiba died in the year 1947.

7. In view of this admitted position, it is necessary to refer to the submissions which are made by the Counsel appearing for the parties. The Counsel appearing for the Appellants submitted that admittedly there was ancestral property in existence in the hands of Dhondiba. Though the suit properties were purchased during the lifetime of Dhondiba in the name of Respondent No.1/Defendant No.1 Anna, the same were purchased out of jointly family funds. He submitted that Respondent No.1-Anna was acting as Karta being the eldest of the brothers. He submitted that once the

existence of nucleus was proved it was for the Respondent No.1 to establish that he had purchased the properties out of his own earnings. The learned Counsel for the Appellants relied upon various documents and in particular documents at Exh.56 and Exh.94. From the said two documents, he pointed out that the suit lands were treated as properties of the brothers. He relied upon the various Judgments and in particular judgments of the Apex Court reported in (2003) 6 S.C.C. page 595 (Roop Kumar v/s. Mohan Thedani), AIR 1995 S.C. page 1728 (Digambar Adhar Patil v/s. Devram Giridhar Patil (dead)), and 2004 (2) Mah.L.J. page 570 (R.Kuppayee v/s.Raja Gaunder). He submitted that as execution of the aforesaid two documents has been proved, the Respondent No.1 was estopped from contending that the properties were his own properties.

8. The learned Counsel Shri Shinde appearing for Respondents Nos.1(a) to 1(d), 1(f), 1(g), 1(h) and 6 supported the Judgments and Decrees of both the Courts below. He submitted that the admissions given in the documents at Exh.56 and Exh.94 have been explained in evidence. He pointed out that the transferor under the document Exh.94 has also not supported the case made out by the Appellants. He submitted that when the properties were purchased by the Respondent No.1-Anna,

admittedly the father of the parties Dhondiba was alive. He pointed out the documents of title which were on record at Exh.96 and Exh.98. He pointed out that the first document was of 4th February 1936 executed by Ambalal Mulchand and others. The said document was executed in favour of Respondent No.1-Anna, Respondent No.2-Laxman Maruti and Ravaba Aba Nanaware. He relied upon the second document dated 9th April 1945 which is executed by Keshavlal Maganlal Gujar in favour of the Respondent No.1, Anandrao Dhondiba Nanavare and Laxman i.e. Respondent No.2. He pointed out that there are concurrent findings of fact recorded by both the Courts below. He also submitted that as the Appellants have failed to prove that they have any right, title and interest in the suit land, no interference was required under section 100 of the Code of Civil Procedure, 1908.

9. I have considered rival submissions. In the plaint prayer is made for perpetual injunction and in the alternative for partition and separate possession of 2/3rd share of the Appellants. It is asserted in the plaint that the parties were in separate possession of the respective portions of the suit land. Reliance is placed on a conditional sale deed executed by the Respondent No.1 in favour of one Sitaram Bhaguji Kapse. It is contended that the property was got released by

the Appellant No.1 and the Respondent No.1 and at that time the agreement at Exh.56 was arrived at between the parties. According to the Appellants the said document clearly constituted admission of their rights by the Respondent No.1. It is the case of the Appellant that even prior to the death of Dhondiba, it was the Respondent No.1 who was looking after the property as karta.

10. At this stage it will be necessary to refer to the written statement filed by the Respondent No.1. It is the case of the Respondent No.1 that he left the house of the father Dhondiba and started earning his own income out of which he purchased 8 anna share in the property bearing Survey No.45. He relied upon the sale deed dated 4th February 1936 and the subsequent sale deed dated 13th February 1945. In so far as the document at Exh.56 is concerned, he denied the transaction with Sitaram Bhaguji Kapse and he contended that the signatures of the parties were obtained by practicing fraud on blank stamp paper and document at Exh.56 has been created. He relied upon the the transaction of loan taken by him against the security of the said property. A separate written statement was filed by the Respondent No.2. He contended that he had 4 anna share in the suit property and the Respondents

Nos.3 to 5 have also 4 anna share in the suit property. A separate written statement was also filed by the Respondent No.6 who also naturally supported the Respondent No.1.

11. It is necessary to see the findings which are recorded by the Appellate Court. In paragraph 10 of the Judgment of the Appellate Court, it is held that in the year 1936, the Appellant No.1 was only four years old and in the year 1945 he was only 12 to 13 years old and he cannot have personal knowledge about the transaction effected in the year 1936 and 1945. In paragraph 11 of the Judgment, the learned Judge has referred to the fact that the family of the brothers possessed land t Bavakalwadi. By referring to the said land the Appellate Court held that there is nothing improbable in the version of Respondent No.1-Anna that the said land was sold by Dhondiba and therefore, there was a dispute and the Respondent No.1 was asked to stay separately. In paragraph 12 of the said Judgment, the Appellate Court held that there is clear evidence to indicate that the family possessed absolutely no nucleus for acquisition of the suit land. In paragraph 13, the Appellate Court has discussed the difference between the property which is a joint family property and the property which is jointly acquired. The Appellate Court

held that the Appellants tried to make improvement in the case made out in the pleadings. The Appellate Court held that the Appellants have not established any connection between the acquisition which has taken place in the years 1936 and 1945 and the family. While referring to the documents at Exh.56, the Appellate Court referred to the one word in the said document having scored out and therefore, it came to the conclusion that the document was doubtful. In paragraph 20 of the judgment the Appellate Court held that in the absence of any previous record to indicate that the land was ancestral or was jointly acquired, the mere admission contained in document at Exh.56 will not be conclusive. The Appellate Court also noted that so far as the possession is concerned, the record was consistently in favour of the Respondent No.1. The Appellate court also noted that in so far as the first sale deed of 1936 is concerned, amongst the brothers only the Respondent No.1-Anna was shown as purchaser and two others who were shown as purchasers were not brothers of the Appellant No.1.

12. So far as the trial Court is concerned, it is pertinent to note that the trial Court considered whether the acquisition was self acquisition by the Respondent No.1 or whether the Respondent No.1 has used

funds received from the Joint Family for the said acquisition. The case made out by the Appellant No.1 in the plaint and the deposition is that the suit land was a Joint Family property which was given by his grand father to one Gujar. It is specifically stated in the deposition of Appellant No.1 that the documents were executed in the year 1936 and 1945 by incorporating the name of the Respondent No.1 as he was the eldest amongst the brothers and was the Karta. Therefore, the Appellant No.1 has made out a case that the three brothers had together 8 anna share, Respondents Nos.2 had 4 anna share and Respondents Nos.3 to 5 together has four anna share. Therefore, it is very clear from the deposition as well as from the pleadings that it was not the case of the Appellants that the property was jointly acquired by the brothers, but the case is that the same was a joint family property being ancestral property in the hands of the grand father. Even the Respondent No.1 seems to be fully aware about the case made out by the Appellants. He also came out with a case in the deposition very specifically that "no property was purchased from the amount received by selling ancestral property and that the amount was spent for daily expenditure." In the first paragraph of his examination-in-chief the Respondent No.1-Anna deposed that Dhondiba was holding ancestral land at Bavakalwadi

and he sold the said ancestral land when he was aged about 14 to 15 years. It is therefore clear that the parties have led evidence and proceeded on the footing that the Appellants were claiming share in the property on the ground that the Respondent No.1 purchased the property on behalf of the joint family from the joint family funds.

13. In view of this position, it is necessary to see the legal position. The case of the Appellant is that the Respondent No.1 purchased 8 anna share in the suit land on behalf of the joint family and the said land was ancestral land in the hands of the father. Therefore, it is for the Appellants to establish that there was ancestral property which can be said to be a nucleus and from the nucleus the Respondent No.1 could have made the acquisition. Once existence of the nucleus is proved, the burden lies on the Respondent No.1 to prove that notwithstanding existence of the nucleus, the entire amount paid for acquisition was from his own earnings and no part of the income received from the nucleus has been utilised for the acquisition. In so far as the Appellate court is concerned, the Appellate Court has no doubt addressed itself to the said controversy. However, the Appellate Court has simply accepted the case made out by the Respondent No.1 that the ancestral

land held by his father Dhondiba was sold when he was aged about 14 to 15 years. After accepting the said statement, the Appellate Court recorded in paragraph 12 that there existed no nucleus and therefore, there could not have been acquisition by the Respondent No.1 from the nucleus.

14. The Respondent No.1, as stated earlier, has stepped into the witness box. He deposed that father was holding ancestral land at Bavakalwadi and the same was sold when the Respondent No.1 was about 15 years of age. In so many words the Respondent No.1 has stated that the land at Bavakalwadi was ancestral land. What has not been referred to by the Appellate Court is the cross-examination of the Respondent No.1. In the cross-examination, the Respondent No.1 has stated as under:

> "My father has only landed property at Bavakalwadi. I do not know in which year and what amount my father has sold out the property.

So the fact which is admitted by the Respondent No.1 is that Dhondiba was having ancestral property. In the examination-in-chief the Respondent No.1 stated that the

ancestral land was sold by his father when he was aged 14 to 15 years old and that no property was purchased from the amount received by sale of the ancestral property. However, in the cross-examination he has admitted that he does not know in which year the ancestral property was sold and what amount was received by his father from the sale of the property.

15. The Appellate Court has not addressed itself to the main controversy as to whether existence of nucleus was proved or not. Existence of nucleus was clear from the admitted position between the parties that Dhondiba was having ancestral property. The only case made out by the Respondent No.1 was that it was sold when he was about 14 to 15 years of age. However, in the cross-examination he could not substantiate the case made out by him. Though the Respondent No.1 stated that the amount received from the sale of the property was not sufficient to purchase any property, in cross-examination he admitted that he was not aware as to what was the amount received by sale of the property. Thus the position which emerges is that existence of nucleus was proved by the Appellants. The Respondent No.1 obviously could not prove that the ancestral property was sold by the father before acquisitions were made in his name or that a particular amount was

received by the father by sale of the said property or that the amount received by sale of the property was not sufficient to purchase or acquire the property in the year 1936 or 1945.

16. The case made out by the Respondent No.1 is that his maternal uncle gave him a loan of Rs.150/- for purchasing the suit land. It is pertinent to note that in paragraph 2 of the written statement of the Respondent No.1, he has specifically come out with a case that he left the house during the life time of his father and started residing separately and he earned income and from his own income he purchased the 8 anna share in land bearing Gat No.45. However,it is in the deposition that he has come out with a case that he took loan of Rs.150/- from his maternal uncle. Therefore, it is obvious that the Respondent No.1 has not discharged the burden shifted on him to prove that the acquisition of 8 anna share was entirely from his own earnings.

17. It is thus clear that the material part of the oral evidence of Respondent No.1 has been ignored by the Appellate Court. If the evidence which is on record in the form of the statements made in the cross-examination by Respondent No.1 have been ignored by the Courts below, interference can be made under section 100 of the

said Code. Apart from this, the Appellate Court has simply proceeded on the assumption that there was no nucleus in existence at the time of acquisition in the name of Respondent No.1. The Appellate Court has not specifically considered whether the case made out by the Respondent No.1 about the sale of ancestral property by the father is established or not. Consideration of the said aspect was relevant for deciding the question whether there was any nucleus on the date of acquisition from which the acquisition could have been made by the Respondent No.1. Thus the only conclusion which can be drawn is that the acquisition of a share in the suit land by the Respondent No.1 cannot be said to be from his own earnings as he has failed to discharge the burden on him. The case of the Appellants that they have undivided share in the property acquired in the name of Respondent No.1 will have to be accepted.

18. In so far as the theory propounded by the Appellants regarding possession of the specific portion of the property is concerned, it is obvious that there is no evidence in support of the said case as found by the Courts below. Therefore, the only question survives is whether the decree for partition can be passed in favour of the Appellants. It is an admitted position that the deceased Mahadeo had three sons and only one

son namely Chandrakant is party to the suit. An attempt is made by the Appellants to contend that Chandrakant is impleaded as Karta of the joint family of deceased Mahadeo. However, the said case is not made out by the Appellant No.2. Admittedly Ramchandra and Ashok the other two sons of Mahadeo were alive when the suit was filed. If the Appellant No.1 and Mahadeo had undivided share in the suit property, Ramchandra and Ashok will also be entitled to a share in the share held by Mahadeo as well as a share in their capacity as members of the joint family. If the decree for partition and separate possession is to be passed, the shares of the parties before the Court cannot be determined unless all the persons who are entitled to a share in the property are impleaded as parties to the suit. Without the presence of Ramchandra and Ashok, a preliminary decree for partition cannot be passed. It is for this reason that the Courts below have recording findings that the suit is bad for non-joinder of necessary parties. In so far as the said finding is concerned, it cannot be disturbed because of the admitted position that the said two sons of Mahadeo are entitled to claim undivided share.

19. Therefore, though the findings of the Courts below as regards title of the Respondent No.1 and the Appellants are erroneous, no fault can be found with the

final order passed by the Courts below regarding the dismissal of the suit filed by the Appellants. In view of the aforesaid discussion, the Second Appeal is dismissed with no order as to costs.

Judge.